SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 25

ELMER W. HENDERSON,

Appellant,

vs.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, AND SOUTHERN RAILWAY COMPANY,

Appellees

MOTION FOR LEAVE TO FILE BRIEF and BRIEF OF AMERICAN VETERANS COMMITTEE, INC. (AVC) Amicus Curiae

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

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OCTOBER 12, 1949,
Washington, D. C.

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HENDERSON v. UNITED STATES, et al

OCTOBER TERM, 1949

No. 25

MOTION FOR LEAVE TO FILE BRIEF
Amicus Curiae

The American Veterans Committee, Inc. (AVC) respectfully moves this Court for leave to file the annexed *amicus curiae* brief. The appellant and two of the appellees (the United States and the Interstate Commerce Commission) have consented to the filing of this brief. The other appellee (Southern Railway Company) has refused to consent to the filing of an *amicus* brief by AVC. We have filed with the Clerk of this Court the letters from the Appellant's attorney, from the Solicitor General of the United States, and from the Chief Counsel of the Interstate Commerce Commission granting consent, and a letter from the General Attorney of the Southern Railway Company refusing consent.

This case involves the validity of a regulation of the Southern Railway Company, approved and sanctioned by the Interstate Commerce Commission, which allocates, in the railroad's dining car, one table for the exclusive use of colored people and ten tables for the exclusive use of white people, and places the "colored" table behind a half-concealing wooden partition and near the kitchen and the steward's office. *Henderson* v. *I. C. C.*, 80 F. Supp. 32, 35 (D. C., D. Md., 1948); *Henderson* v. *Southern Railway Co.*, 269 I. C. C. 73, 75 (1947); R. 201, 223, 252, 7.

The American Veterans Committee, Inc. (AVC) is an organization of veterans of World War II associated, regardless of national origin, creed or color, to promote the democratic principles for which they fought, including the elimination of racial discrimination.[1] AVC has a direct interest in the abolition of the regulation here involved because it affects personally not only those of AVC's members who are colored, but also AVC's white members when travelling in mixed groups. But more, AVC believes that this regulation, which perpetuates an unjustifiable and ostentatious racial discrimination, is inconsistent with the ideals of our country and tends to frustrate the objectives for which we fought in World War II. Most of us served overseas. There was no "community pattern" of racial discrimination and segregation when the chips were down and there was only the mud, the foxholes, and the dangers of the ocean and of mortal battle in the fight to preserve our Nation's way of life. One of the major aims of the United States and the allied nations was the defeat of the Nazi and fascist philosophy of racism. The regulation here involved is of the same cloth as that racism. As American citizens and veterans who fought and bled in World War II to eliminate that racism, we continue to oppose it in civilian affairs in order to prevent its becoming a catalyst for another World War.

AVC believes that the right to be free from the discrimination which this regulation imposes in transportation is an integral portion of the great right of freedom from racial discrimination which this Court has previously vindicated

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[1] AVC's *amicus curiae* briefs in the following recent civil rights cases before this Court are illustrative of AVC's views: *Shelley* v. *Kraemer*, 334 U. S. 1 (1948); *Hurd* v. *Hodge*, 334 U. S. 24 (1948); *Takahashi* v. *Fish and Game Commission*, 334 U. S. 410 (1948); *United States* v. *C. I. O.*, 335 U. S. 106 (1948); *Stainback* v. *Mo Hock Ke Lok Po*, 336 U. S. 368 (1949); and *Sweatt* v. *Painter*, No. 44, Oct. Term, 1949 (now pending).

in such matters as housing,[2] employment,[3] education,[4] jury service,[5] voting,[6] etc.

For these reasons AVC respectfully moves this Court for leave to file the attached *amicus curiae* brief.

AMERICAN VETERANS COMMITTEE, INC. (AVC)

By: PHINEAS INDRITZ.

BRIEF OF AMERICAN VETERANS COMMITTEE (AVC) AMICUS CURIAE

I. THE SOUTHERN RAILWAY COMPANY'S REGULATION VIOLATES SECTION 3(1) OF THE INTERSTATE COMMERCE ACT WHICH FORBIDS DISCRIMINATION AGAINST PASSENGERS BECAUSE OF THEIR RACE.

Section 3(1) of the Interstate Commerce Act, 49 U. S. C. 1946 ed., sec. 3(1), provides:

> "It shall be unlawful for any common carrier subject to the provisions of this [act] . . . to subject

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[2] *Shelley* v. *Kraemer*, 334 U. S. 1 (1948); *Hurd* v. *Hodge*, 334 U. S. 24 (1948); *Buchanan* v. *Warley*, 245 U. S. 60 (1917); *Harmon* v. *Tyler*, 273 U. S. 668 (1927); *City of Richmond* v. *Deans*, 281 U. S. 704 (1930).

[3] *Takahashi* v. *Fish and Game Commission*, 334 U. S. 410 (1948); *Steele* v. *Louisville & Nashville R. Co.*, 323 U. S. 192 (1944); *Truax* v. *Raich*, 239 U. S. 33 (1915); *Yu Cong Eng* v. *Trinidad*, 271 U. S. 500 (1926); *Yick Wo* v. *Hopkins*, 118 U. S. 356 (1886); *Railway Mail Ass'n* v. *Corsi*, 326 U. S. 88 (1945); *Kotch* v. *Pilot Commissioners*, 330 U. S. 552, 556 (1947).

[4] *Sipuel* v. *Board of Regents*, 332 U. S. 631 (1948); *Missouri ex rel. Gaines* v. *Canada*, 305 U. S. 337 (1939). See *Sweatt* v. *Painter*, No. 44, Oct. Term, 1949, U. S. Sup. Ct.

[5] *Ex parte Virginia*, 100 U. S. 339 (1880); *Virginia* v. *Rives*, 100 U. S. 313 (1880).

[6] *Smith* v. *Allwright*, 321 U. S. 649 (1944); *Schnell* v. *Davis*, 336 U. S. 933 (1949); *Lane* v. *Wilson*, 307 U. S. 268 (1939); *Rice* v. *Elmore*, 165 F. (2d) 387 (C.C.A. 4th 1947), *cert. den.*, 333 U. S. 875 (1948).

any particular person . . . to any undue or unreasonable prejudice or disadvantage in any respect whatsoever. . . .'"

There is no controversy in this case on the following propositions:

(1) that the Southern Railway Company, an interstate common carrier, is subject to this provision.

(2) that this provision forbids "discrimination against colored passengers because of their race" and requires the carrier "to provide equality of treatment with respect to transportation facilities". *Mitchell* v. *United States*, 313 U. S. 80, 94 (1941); *Bob-Lo Excursion Co.* v. *Michigan*, 333 U. S. 28, 37, ftnt. 16 (1948).

(3) that this provision applies to the railroad's dining cars.

(4) that the seating arrangements and the partition described in the railroad's regulations are "based wholly upon color; simply that and nothing more". *Buchanan* v. *Warley*, 245 U. S. 60, 73 (1917); *Shelley* v. *Kraemer*, 334 U. S. 1, 10 (1948).

We submit that the railroad's regulation and practice are tainted with unlawful racial discrimination in at least the following respects:

(1) *Inequality in promptness of service.* When the "colored" table is occupied by four colored passengers, the railroad's regulation precludes a fifth colored person from service in the dining car even though there are many vacant tables or seats in the remainder of the dining car. That

[7] Similar provisions apply to carriers by water (46 U.S.C., 1946 ed., sec. 815; 49 U.S.C., 1946 ed., sec. 905) and to carriers by air (49 U.S.C., 1946 ed., sec. 484). They are supplementary to the common-law obligation of carriers to provide equal service to all. *Missouri Pac. Ry.* v. *Larabee Flour Mills Co.*, 211 U. S. 612, 619, 623-624 (1909).

fifth colored person is clearly subjected to a "prejudice or disadvantage" solely because of his color: he must wait, while later white passengers are seated. Similarly, when all the "white" tables are occupied, a 41st white passenger is precluded from service even though some or all of the chairs at the table reserved for "colored" passengers are empty. He too is subjected to a "prejudice or disadvantage" solely because of his color; he must wait, while later colored passengers are seated.

(2) *Mixed groups.* Where friends or families travelling together are of different racial ancestry, the railroad's regulation perpetrates a particularly obnoxious discrimination, hauntingly reminiscent of that bygone day when friends and family were separated at the slave block. For example, where such a mixed group is composed of four persons, one of whom is colored, the white persons are permitted to eat with their white friends or relatives, but the colored person is not. He is separated from his family or friends. Nor are the white persons in the group untouched by the discrimination since they are prevented from eating with their colored friend or relative.

(3) *Humiliation by use of the partition.* Aside from the embarrassment and humiliation occasioned by the denial of service to individuals in the situations mentioned above in (1) and (2), the railroad imposes humiliation and ostracism on colored passengers through the use of the half-concealing partition and the separate table as a symbolic assertion that the colored man is inferior (R. 105). In bold view of all persons in the dining car, the railroad in effect proclaims that the colored persons are unfit to sit anywhere else in the dining car. *To Secure These Rights*, Report of the President's Committee on Civil Rights, p. 79 (Oct. 29, 1947).

(4) *Denial of choice of seat.* The regulation, solely on the basis of race, denies to colored passengers any freedom of choice of a seat in the dining car. A colored passenger may eat only at the one "colored" table. All other persons on the train have at least the opportunity to choose a seat at any one of ten tables.

(5) *Inequality in location of the "colored" table.* The fact that segregation is practically always used to impose a significant discrimination is shown by the fact that the table assigned for colored passengers is the least desirable table in the dining car, *i. e.*, the table nearest the kitchen and the buffet and immediately across the aisle from the space used as the steward's office, where the bustle and disturbance to diners are greatest.

It is no answer to say that the seating space is reserved on the basis of statistical studies of the number of persons of each race seeking dining car accommodations (R. 9); or that both the white and colored races are being subjected to segregation (R. 260). These arguments, relied on by the majority decision in the court below, disregard the fact that section 3(1) of the Interstate Commerce Act expressly forbids the railroad to subject "any particular person" to unreasonable discrimination. "The essence of that right is that it is a personal one . . . It is the individual . . . who is entitled" to the protection of the statute, "not merely a group of individuals, or a body of persons according to their number." *Mitchell* v. *United States*, 313 U. S. 80, 97 (1941); *McCabe* v. *Atchison, T. & S. F. Ry. Co.*, 235 U. S. 151, 161-162 (1914); *Missouri ex rel. Gaines* v. *Canada*, 305 U. S. 337, 351 (1939); *Shelley* v. *Kraemer*, 334 U. S. 1, 22 (1948). The fact that a particular colored passenger could secure dining service by coming early does not mitigate the discrimination imposed on the colored person who, finding the "colored" table filled,

is denied service while white passengers are seated at vacant seats in the dining car. *Mitchell* v. *United States, supra*, at p. 96-97. Nor does the fact that when the 40 seats at the "white" tables are filled a white person is denied service at the "colored" table although seats are there available, justify the discrimination imposed on colored persons who seek dining car service. In both instances, each such colored passenger, and each such white passenger, is subjected to unreasonable discrimination solely on the basis of his race. But this Court has pointed out that equality of treatment "is not achieved through indiscriminate imposition of inequalities". *Shelley* v. *Kraemer*, 334 U. S. 1, 21-22 (1948).

We submit that the "prejudice or disadvantage" which the railroad's regulation imposes in this case is "undue or unreasonable . . . in any respect whatsoever" and is therefore forbidden by the Interstate Commerce Act.

The national policy of the United States is against the "obviously irrelevant and invidious" distinctions of race. *Steele* v. *Louisville & Nashville R. Co.*, 323 U. S. 192, 203 (1944); *Hurd* v. *Hodge*, 334 U. S. 24 (1948); *Shelley* v. *Kraemer*, 334 U. S. 1 (1948); *Bob-Lo Excursion Co.* v. *Michigan*, 333 U. S. 28 (1948); *Mitchell* v. *United States*, 313 U. S. 80 (1941); *Charter of the United Nations*, Articles 55(c), 56 (59 Stat. 1031, 1045-1046). The fact that the railroad's regulation flies in the teeth of that policy is alone sufficient to hold that it is unreasonable. *Cf. Air Terminal Services, Inc.* v. *Rentzel*, 81 F. Supp. 611 (D. C., E. D. Va. Alex. Div. 1949).

Nor can the discriminations which have been imposed by the railroad and sanctioned by the Interstate Commerce Commission be justified as being for the benefit of the travelling public. The regulation increases the railroad's costs and reduces service to the public. Moreover, it imposes discrimination without any regard for the wishes of

the individuals concerned. The railroad does not inquire whether a passenger seeking dining service would rather eat at a "white" table or at a "colored" table; or, where a table is partially occupied, whether the passenger already seated or the passenger seeking dining car service has any objection to the latter's being seated at the particular table. Undoubtedly there are people who would refuse to eat with persons of another race. We believe that such people do not constitute the majority of the travelling public who use the dining cars. Many southern whites "think it is all nonsense that they have the restriction" (R. 42). The railroad's assumption that the majority of travellers would affirmatively refuse is entirely *a priori*, unsupported by any investigation or inquiry from the travelling public. Furthermore, no matter what the desires or responses of the travelling public might be, the railroad's regulation flatly prohibits all passengers of different races from eating together at any vacant table. Such a regulation, we think, is unreasonable.

The railroad officials in their testimony sought to justify the regulation by saying they "had the Virginia statute in mind" when they issued their regulation (R. 202), although they disclaimed that the regulation was "based on the state laws" (R. 202, 205, 208). As a matter of fact, the Virginia statute (Va. Code (1942) sec. 3962) requires "separate cars or coaches" and does not in terms apply to dining car service. *Henderson* v. *United States*, 63 F. Supp. 906, 913 (D. C., D. Md. 1945) (R. 73). Moreover, since the Virginia statute requires a partition "with a door therein", which the wooden partition in this case lacks, the regulation would in any event not comply with the statute. The regulation, therefore, cannot be justified on the basis of the state statute.

But even if the Virginia statute is here applicable, it is clear that the application of the statute to this case would

be constitutionally invalid. The Southern Railway operates through the District of Columbia, Virginia, North Carolina, South Carolina, Georgia, Florida, Alabama, Misissippi, Louisiana, Tennessee and Kentucky (R. 167-168). These states have varying definitions as to who is a colored person. A person is labeled "colored" in these States as follows: *Kentucky:* anyone with one-fourth or more Negro blood;[8] *Mississippi, North Carolina, South Carolina:* anyone with one-eighth or more Negro blood;[9] *Florida:* anyone with one-eighth or more Negro or African blood;[10] *Alabama:* anyone with "any Negro ancestry without reference to . . . number of generations removed;"[11] *Georgia:* anyone having "any ascertainable trace of either Negro, African, West Indian or Asiatic Indian blood;"[12] *Tennessee:* anyone having "any blood of African race";[13] *Virginia:* "Every person in whom there is ascertainable any negro blood . . . except that members of Indian tribes living on reservations allotted them by the Commonwealth of Virginia having one-fourth or more of Indian blood and less than one-sixteenth of negro blood shall be deemed tribal Indians so long as they are domiciled on said reservations."[14] Thus, a person classified as "white" and seated at a "white" table while the train was in one of these states might become a "colored" person and be forced to move to the "Jim Crow" table as the train crossed the state line. These varying definitions as to who is a "colored" person were specifically

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[8] *McGoodwin* v. *Shelby*, 182 Ky. 377, 383, 206 S. W. 625, 627-628 (1918).

[9] Miss. Code Ann. (1942) sec. 459; N. Car. Gen. Stats. (1943) sec. 51-3; *State* v. *Miller*, 224 N. Car. 228, 29 S. E. (2d) 751 (1944); S. Car. Const. of 1895, Art. 3, sec. 33; *Tucker* v. *Blease*, 97 S. Car. 303, 81 S. E. 668 (1913).

[10] Fla. Stats. Ann. (1943) sec. 1.01(6).

[11] Ala. Code (1940) title 1, sec. 2.

[12] Ga. Code Ann. (1937) sec. 79-103.

[13] Tenn. Code Ann. (Michie 1938) sec. 25.

[14] Va. Code Ann. (1942) sec. 67.

mentioned by this Court as among the "interferences to interstate commerce which arise" from such "state regulation of racial association on interstate vehicles," when this Court held that the Virginia racial segregation statutes as applied to an interstate carrier were an unconstitutional burden on interstate commerce. *Morgan* v. *Virginia*, 328 U. S. 373, 382-383 (1946). See also *Matthews* v. *Southern R. System*, 157 F. (2d) 609, 81 App. D. C. 263 (1946). Since the statute upon which the railroad officials sought to justify their regulation would, if here applicable, clearly be unconstitutional, it cannot be said that the regulation is a reasonable regulation.

Equally unsubstantial is the railroad's contention that the regulation is necessary for "keeping peace and order", preventing "discord" and "race riot" and "keeping down friction" (R. 168-169). The record fails to show that there has been any difficulty in keeping the peace, or that there has been any discord or race riot, in the unsegregated use of any facility on the train. No "race riots" occur in the pullman cars, where white and colored people sit and sleep in the same car without racial segregation. Moreover, the record shows that in these very dining cars of the Southern Railway, white and colored servicemen were served together without distinction (R. 67, 151, 152) and that occasionally white and colored civilians were served together (R. 145, 147, 148, 150, 151). No disorder occurred (R. 148). Even if unrestricted use of the dining car facilities by colored passengers occasionally gives rise to an incident, the conductor has ample police authority to deal with any trouble maker (R. 180, 181). In any event "There is no room for administrative or expert judgment with respect to practical difficulties. It is enough that the discrimination shown was palpably unjust and forbidden by the act." *Mitchell* v. *United States*, *supra*, at 97.

II. THE RAILROAD'S DISCRIMINATORY REGULATION WAS APPROVED AND ENDORSED BY THE INTERSTATE COMMERCE COMMISSION. SUCH APPROVAL AND ENDORSEMENT IS EQUIVALENT TO THE ADOPTION THEREOF BY THE COMMISSION AS ITS OWN REGULATION, IMPOSING DISCRIMINATIONS SOLELY ON THE BASIS OF RACE. AS SUCH, IT IS UNCONSTITUTIONAL.

The Interstate Commerce Act provides a broad system of regulation of interstate carriers to achieve "the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act . . . without unjust discriminations . . ." Transportation Act of Sept. 18, 1940 (54 Stat. 898, 899, 49 U. S. C., 1946 ed., note preceding sec. 1).

The Act imposes upon carriers the duty "to provide reasonable facilities . . . and to make reasonable rules and regulations . . . [sec. 1(4)]; forbids the railroad "to subject any particular person . . . to any undue or unreasonable prejudice or disadvantage in any respect whatsoever" [sec. 3(1)]; and requires the railroad to file with the Interstate Commerce Commission schedules setting forth "all privileges or facilities granted or allowed and any rules or regulations which in any wise . . . affect . . . the value of the service rendered to the passenger" [sec. 6(1)].

Congress has not left the enforcement of these duties to litigation in the courts. It has established the Interstate Commerce Commission [sec. 11]; has authorized "Any person . . . complaining of anything done or omitted to be done by any common carrier" to file a complaint with the Commission; and has imposed on the Commission "the duty

. . . to investigate the matters complained of" [sec. 13(1)]. The Commission is empowered to hold hearings on such complaints, and if it finds "any regulation or practice whatsoever of such carrier . . . unjust or unreasonable or prejudicial . . . the Commission is . . . empowered to determine and prescribe what . . . regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier . . . shall cease and desist from such violation . . . and shall conform to and observe the regulation or practice so prescribed" [sec. 15(1)].

In this case, Henderson filed a complaint with the Commission charging that the railroad's regulation was discriminatory and requesting that that regulation be replaced by a nondiscriminatory regulation. A hearing was held, and the Commission in its report explicitly approved and endorsed the railroad's regulation as "adequate" and "an equitable and reasonable division between the races of its available dining-car space." *Henderson* v. *Southern Railway Co.*, 258 I. C. C. 413, 419 (1944) (R. 191-192); *Henderson* v. *Southern Railway Co.*, 269 I. C. C. 73, 77 (1947) (R. 9, 10). Such approval by the Commission necessarily required a determination that the regulation was reasonable and proper. In view of the Commission's power to prescribe the regulations to govern the railroad, and its duty to prescribe nondiscriminatory regulations and to forbid discriminatory regulations, that determination and that approval of the regulation constitute an adoption of the regulation equivalent to the issuance of such a regulation by the Commission. *Cf. Smith* v. *Allwright*, 321 U. S. 649 (1944); *Schnell* v. *Davis*, 336 U. S. 933 (1948); *Shelley* v. *Kraemer*, 334 U. S. 1 (1948); *Steele* v. *Louisville & Nashville R. Co.*, 323 U. S. 192 (1944); *Nixon* v. *Condon*, 286 U. S. 73 (1932); *Marsh* v. *Alabama*, 326 U. S. 501 (1946); *Kerr* v. *Enoch Pratt Free Library*, 149 F. (2d) 212 (C. C. A. 4th

1945), *cert. denied*, 326 U. S. 721 (1945). The court below, in fact, had unanimously held that since the railroad's regulations "have been directly approved by" the Commission "they are to be treated, for the purposes of this case, as in effect the Commission's rules". *Henderson* v. *United States*, 63 F. Supp. 906, 914 (D. C., D. Md., 1945) (R. 74). Accordingly, the regulation has in effect become the regulation of the Commission. As such, it must conform to the great requirements of the Constitution.

The regulation in this case is "based wholly upon color; simply that and nothing more". Its effect, as shown in Part I of this Brief, is to impose discriminations solely on the basis of race. The national policy of Congress is against racial discrimination in interstate transportation. *Bob-Lo Excursion Co.* v. *Michigan*, 333 U. S. 28, 37, ftnt. 16 (1948). But, even more important, the Constitution itself forbids such discrimination. This Court has consistently affirmed that under our Constitution governmental restrictions and discriminations based "wholly upon color" or aimed at particular racial groups "in the eye of the law is not justified". *Yick Wo* v. *Hopkins*, 118 U. S. 356, 374 (1886); *Yu Cong Eng* v. *Trinidad*, 271 U. S. 500, 525-527 (1926); *Smith* v. *Texas*, 311 U. S. 128, 130 (1940); *Steele* v. *Louisville & Nashville R. Co.*, 323 U. S. 192, 203, 208 (1944). And there is here entirely absent any "pressing public necessity" or "compelling justification" which it has been said "may sometimes justify" restricting the rights and freedoms of persons solely on the basis of their race. *Korematsu* v. *United States*, 323 U. S. 214, 216 (1944); *Oyama* v. *California*, 332 U. S. 633, 640 (1948). It is immaterial whether this Constitutional protection against the Commission's manifestation of racial hostility in endorsing and adopting the railroad's regulation is ascribed to the Due Process Clause of the Fifth Amendment, as implied in *Hirabayashi* v. *United States*, 320 U. S. 81, 100 (1943) and

Korematsu v. *United States*, 323 U. S. 214, 216 (1944), or is ascribed to the established public policy of the United States which forbids any branch of the Federal Government to do what the Equal Protection Clause of the Fourteenth Amendment would, if this regulation had been a State statute, clearly deny to a State Government. *Hurd* v. *Hodge*, 334 U. S. 24, 35-36 (1948); *Shelley* v. *Kraemer*, 334 U. S. 1 (1948). By either of these tests, the regulation in this case cannot withstand the flame of the Constitution against racial discrimination by governmental authority.

III. THIS COURT'S PREVIOUS DECISIONS CONCERNING RACIAL SEGREGATION IN TRANSPORTATION DO NOT SUPPORT THE ENFORCED RACIAL SEGREGATION IN THIS CASE. THE "SEPARATE BUT EQUAL" DOCTRINE OF PLESSY v. FERGUSON IS INCONSISTENT WITH THE RATIONALE OF THE CONSTITUTIONAL PROTECTION AGAINST RACIAL DISCRIMINATION AND ITS APPLICATION ALWAYS RESULTS IN DISCRIMINATION. IT SHOULD BE REPUDIATED.

The Interstate Commerce Commission's order approving the railroad's regulation was based on the contention, upheld by the court below, that "racial segregation of interstate passengers is not per se forbidden by the Constitution or by any act of Congress" (R. 6); that "the principle of segregation" has been "approved by the Supreme Court" (R. 9); and that "interstate carriers may separate white and colored passengers if substantial equality of treatment is accorded to both races when traveling under like conditions" (R. 10). *Henderson* v. *Southern Ry. Co.*, 269 I. C. C. 73, 74, 77 (1947).

We submit that none of this Court's previous decisions involving racial segregation in transportation affords the

regulation in this case any shield against the thrusts either of section 3(1) of the Interstate Commerce Act or of the Constitutional protection against racial discrimination by governmental action. We believe that the principles flowing from *Railroad Company* v. *Brown*, 84 U. S. (17 Wall.) 445 (1873); *Mitchell* v. *United States*, 313 U. S. 80 (1941); *Morgan* v. *Virginia*, 328 U. S. 373 (1946); and *Bob-Lo Excursion Co.* v. *Michigan*, 333 U. S. 28 (1948) negate the basis for the Commission's contentions. And we urge that the so-called "separate but equal" doctrine established by *Plessy* v. *Ferguson*, 163 U. S. 537 (1896) is inconsistent with the constitutional prohibition against racial discrimination and should be repudiated.

A. This Court's decisions against racial distinctions in transportation negate the basis upon which the regulation in this case was upheld by the Interstate Commerce Commission.

In *Railroad Company* v. *Brown*, *supra*, an act of Congress authorizing a railroad to extend its line into the District of Columbia provided that "no person shall be excluded from the cars on account of color". This provision was enacted on March 3, 1863 (12 Stat. 805). The statement of the case (at p. 447) indicates that "a colored woman, on the 8th day of February, 1868, anterior to the adoption of the fourteenth and fifteenth amendments to the Constitution, bought a ticket to come from Alexandria to Washington". The railroad refused to let her ride in a car where white passengers were seated and required her to sit in a car reserved exclusively for colored people. The latter car, the carrier said, was equal in comfort to the cars reserved for white people. The railroad's evidence showed "that the regulation of separating white from colored persons was one which was

in force on the principal railroads in the country" (p. 448). This Court said (84 U. S. 445, 452-453):

> "The plaintiff in error contends that it has literally obeyed the direction, because it has never excluded this class of persons from the cars, but on the contrary, has always provided accommodations for them.
>
> "This is an ingenious attempt to evade a compliance with the obvious meaning of the requirement. It is true the words taken literally might bear the interpretation put upon them by the plaintiff in error, but evidently Congress did not use them in any such limited sense . . . . It was the *discrimination in the use of the cars* on account of color, where slavery obtained, which was the subject of discussion at the time, and not the fact that the colored race could not ride in the cars at all. Congress, in the belief that this *discrimination* was unjust . . . . told the company, in substance, that it could extend its road within the District as desired, but that *this discrimination must cease*, and the colored and white race, in the use of the cars, be placed on an equality." [Emphasis supplied].

Railroad Company v. *Brown*, although mentioned in the majority opinion in *Plessy* v. *Ferguson*, *supra*, at 545-546, has never been expressly overruled. It demonstrates that Congress has viewed racial segregation in transportation as constituting "discrimination." We believe that the concept of "discrimination" in the Interstate Commerce Act was intended by Congress to have the same meaning with respect to racial segregation that Congress and this Court accorded to that concept in *Railroad Company* v. *Brown*. The Interstate Commerce Commission's interpretation of the Interstate Commerce Act as prohibiting racial "discrimination" but not racial "segregation" is, we think, in error and disregards the teaching of *Railroad Company* v. *Brown*. The Commission's administrative interpretation and the absence of specific Congressional repudiation

thereof are insufficient to bar this Court from re-examining that interpretation. "'It is at best treacherous to find in congressional silence alone the adoption of a controlling rule of law'', especially when it limits a human right as basic and important as the right to freedom from enforced racial distinctions. Cf. *Girouard* v. *United States*, 328 U. S. 61, 69 (1946). In any event, there is here lacking the "very persuasive circumstances enveloping Congressional silence" which must be present before this Court may properly shift to Congress the responsibility for perpetuating the Commission's erroneous interpretation. *Helvering* v. *Hallock*, 309 U. S. 106, 119 (1940); *Girouard* v. *United States*, *supra*, 69-70.

Mitchell v. *United States*, 313 U. S. 80 (1941) was initiated, as was this case, by a complaint filed with the Interstate Commerce Commission, under the Interstate Commerce Act, against a railroad's refusal of available pullman accommodations to a Negro passenger after the drawing room, reserved for Negroes, had become occupied. This Court, explicitly putting aside the question of segregation (p. 94), held that the railroad's practice was discriminatory and that "comparative volume of traffic cannot justify the denial of a fundamental right of equality of treatment" (p. 97). The present case involves, among other matters, the railroad's refusal of available seats in the dining car after the table reserved for colored people has become occupied.

In *Morgan* v. *Virginia*, 328 U. S. 373 (1946), this Court held that a Virginia statute requiring a common carrier in interstate commerce to allocate separate seats to white and colored persons was invalid as an undue burden on interstate commerce.

In *Bob-Lo Excursion Co.* v. *Michigan*, 333 U. S. 28 (1948), a Michigan statute penalizing the denial of "full and equal accommodations, advantages, facilities and privileges of

. . . public conveyances on land and water'' was applied to a company which refused to grant equal accommodations to a colored person on a vessel plying between Detroit, Michigan and Bois Blanc Island in Ontario, Canada. This Court held that the statute as thus applied was not an unconstitutional burden on foreign commerce.

These cases, we submit, establish a pattern of hostility to racial discrimination and segregation in transportation stemming from both Congress and the Constitution. They indicate that compliance with the Constitution and the Interstate Commerce Act in transportation, at least where the transportation is subject to Federal power, as it is here, can be achieved only through the pattern of unsegregated transportation. They undermine and negate the basis upon which the regulation in this case was upheld by the Interstate Commerce Commission.

B. This Court's decisions refusing to invalidate racial segregation in transportation do not aid the regulation in this case.

None of the decisions by this Court refusing to invalidate racial segregation in transportation aid the regulation here involved. None of them, in fact, involved a complaint filed with the Interstate Commerce Commission under Section 3(1) and 1(4) of the Interstate Commerce Act, as is the case here. Nor was the Interstate Commerce Act even mentioned in those cases.

In three of those cases, involving suits initated in State courts, this Court held that railroad companies prosecuted for failure to comply with State segregation statutes applicable only to intrastate commerce could not successfully defend on the theory that the statutes unconstitutionally burdened interstate commerce. Clearly, these decisions are not relevant to this case. In fact, the first of these three decisions explicitly stated (at p. 589): ''It will also be

observed that this is not a civil action brought by an individual to recover damages for being compelled to occupy one particular compartment . . . and hence there is no question of personal insult or alleged violation of personal rights." *Louisville, New Orleans and Texas Ry. Co.* v. *Mississippi*, 133 U. S. 587 (1889); *Chesapeake & O. R. Co.* v. *Kentucky*, 179 U. S. 388 (1900); *South Covington & Cin. R. Co.* v. *Kentucky*, 252 U. S. 399 (1920). The narrow reach of these three cases is amply demonstrated by this Court's decision in *Morgan* v. *Virginia*, 328 U. S. 373 (1946), invalidating Virginia's transportation segregation law in its application to interstate commerce.

In *McCabe* v. *Atchison, T. & S. F. Ry. Co.*, 235 U. S. 151 (1914), a suit was initated in a state court to enjoin the enforcement of Oklahoma's "Separate Coach Law" as repugnant to the Commerce Clause and the Fourteenth Amendment of the Constitution. The attack failed primarily because the complainant's allegations were "too vague and indefinte", and the complainants were not proper parties, to warrant injunctive relief. In addition, the Commerce Clause argument was rejected because the statute applied only to intra-state commerce; and the Fourteenth Amendment argument against segregation was rejected (at p. 160) simply on a citation to *Plessy* v. *Ferguson*, *supra*. Thus, the *McCabe* case, insofar as its refusal to invalidate the segregation there present is pertinent here, rests at most only on the citation to the *Plessy* case.

In *Chiles* v. *Chesapeake, etc., R. Co.*, 218 U. S. 71 (19 , an interstate passenger who was forced to ride in a s a rate "colored" car instituted an unsuccessful suit for damages in a state court against the carrier. The carrier's regulation was not based on a state statute. The decision rested almost entirely on *Hall* v. *DeCuir*, 95 U. S. 485 (1877) for the proposition that "the inaction of Congress was equivalent to the declaration that a carrier could by regula-

tions separate colored and white interstate passengers" and on *Plessy* v. *Ferguson, supra,* as permitting "separate but equal" transportation accommodations. However, *Hall* v. *DeCuir* did not involve the constitutional right of passengers to be free from racial segregation under state law. All that this Court there held was that a State lacked power to award damages against a carrier engaged in interstate commerce for failing to comply with a state law forbidding the denial of equal accommodations on the basis of race, because the enforcement of such a statute unduly burdens interstate commerce. Moreover, *Hall* v. *DeCuir* was decided 10 years before the enactment of the Interstate Commerce Act of 1887.[15] The latter act, certainly, is "Action of Congress". *Hall* v. *DeCuir* therefore furnishes no support for the *Chiles* decision. Nor did the *Chiles* opinion even mention the Interstate Commerce Act. The *Chiles* decision therefore cannot be deemed to be a construction of the Interstate Commerce Act.

Thus, the edifice of racial segregation in transportation, which these cases appear to support, rests essentially (a) on cases where it was sought to apply the Commerce Clause to intra-state commerce, cases brought by improper parties, and cases decided prior to the enactment of the Interstate Commerce Act, none of which are here relevant; and (b) on the "separate but equal" doctrine of *Plessy* v. *Ferguson.* We therefore turn to analyze the *Plessy* decision.

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[15] The Civil Rights Act of March 1, 1875 (18 Stat. 335), enacted 2 years before the *Hall* decision, forbade public carriers from refusing equal accommodations because of race. No mention of this act was made in the *Hall* case. However, this act was later held invalid in *Civil Rights Cases,* 109 U. S. 3 (1883), which involved intra-state accommodations. The act was subsequently held to be inseparable, and in view of its invalidation in *Civil Rights Cases,* not applicable to a common carrier by water in the coastwise trade, a field clearly subject to the Commerce Power of Congress. *Butts* v. *Merchants Transportation Co.,* 230 U. S. 126 (1913).

C. PLESSY v. FERGUSON is unsound and should be repudiated.

Plessy v. *Ferguson* held that a state statute requiring an intra-state railroad to furnish equal but separate accommodations for white and colored people by providing two or more passenger cars for each passenger train or by dividing the passenger coaches by a partition and punishing any passenger entering a coach or compartment not allocated to his race, was not invalid under the Thirteenth and Fourteenth Amendments.

Plessy was initiated in a State Court and involved a State segregation statute applicable only to intra-state transportation. It did not involve, as does this case, a complaint filed with the Interstate Commerce Commission under the Federal Interstate Commerce Act.

Moreover, *Plessy* did not expound a general rule that "separate but equal" is equal protection in every area of human relations. Actually, *Plessy* correctly stated that it would be unconstitutional for a State to make unreasonable distinctions between white and colored people, such as "to require separate cars to be provided for people whose hair is of a certain color, or who are aliens, or who belong to certain nationalities, or to enact laws requiring colored people to walk upon one side of the street, and white people upon the other, or requiring white men's houses to be painted white, and colored men's black, or their vehicles or business signs to be of different colors, upon the theory that one side of the street is as good as the other, or that a house or vehicle of one color is as good as one of another color." (163 U. S. 537, 549-550). The application of this very standard, particularly in view of the undue burden which a state segregation statute would impose on interstate commerce (*Morgan* v. *Virginia*, *supra*), and the national policy against racial distinctions, would render

unreasonable the notion of "separate but equal" in relation to this case.

In any event, if *Plessy's* holding, that segregation on intra-state trains is compatible with the Fourteenth Amendment, is deemed applicable to this case, we believe that *Plessy* is erroneous and should now be overruled. *Plessy* has for too long clothed racial discrimination and segregation with the cloak of Supreme Court approval. Justice Harlan was indeed prophetic in his dissent in *Plessy* (at p. 559): ". . . the judgment this day rendered will, in time, prove to be quite as pernicious as the decision made by this tribunal in the *Dred Scott case.*" [*Dred Scott* v. *Sanford*, 60 U. S. (19 How.) 393 (1856).]

We urge that *Plessy* is erroneous in at least the following points:

(1) *Plessy* postulates a distinction in the Fourteenth Amendment between "social" and "political equality." At p. 544, the court said: "The object of the [Fourteenth] amendment was undoubtedly to enforce the absolute equality of the two races before the law, but in the nature of things it could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political equality, or a commingling of the two races upon terms unsatisfactory to either." However, the Fourteenth Amendment contains no such distinction. What the Fourteenth Amendment did, as this Court stated in *Strauder* v. *West Virginia*, 100 U. S. 303, 306 (1880), was to provide "a positive immunity, or right, most valuable to the colored race—the right to exemption from unfriendly legislation against them distinctly as colored; exemption from legal discrimination, implying inferiority in civil society, lessening the security of their enjoyment of the rights which others enjoy, and discriminations which are steps towards reducing them to the condition of a subject race." It is

not the labeling of a right as "political" or "social," but rather whether governmental authority has been used to deny to anyone, on the basis of race, a right or privilege available to others, which determines the application of the Fifth and Fourteenth Amendments in racial cases. Train travel, certainly, is no more exempt from the application of the Fifth and Fourteenth Amendments as being "social" in nature than is the right to acquire a home in a neighborhood which the Fourteenth Amendment protected in *Buchanan* v. *Warley*, 245 U. S. 60 (1917) and *Shelley* v. *Kraemer*, 334 U. S. 1 (1948). Nor did this Court make any such distinction when it protected the right of a colored man to pullman accommodations on a train in *Mitchell* v. *United States*, 313 U. S. 80 (1941). In any event, the *Plessy* statement was not even pertinent—the colored man in *Plessy* was demanding, not the abolition of discrimination in private social relations, but only that the State should not by law compel the imposition of racial prejudice in the use of business facilities open to the public. The Fourteenth Amendment does not reach private action, but it certainly reaches State action. *Civil Rights Cases*, 109 U. S. 3 (1883); *Shelley* v. *Kraemer*, 334 U. S. 1 (1948).

(2) A second major erroneous assumption underlying the *Plessy* decision was the majority's statement that "Laws permitting, and even requiring, their separation in places where they are liable to be brought into contact do not necessarily imply the inferiority of either race to the other . . ." (p. 544), and its denial that "the enforced separation of the two races stamps the colored race with a badge of inferiority" (p. 551). The fact is, however, that equal treatment is never seriously intended or achieved under a system of racial segregation. The very purpose of compulsory racial segregation is to impose a symbolic superior-inferior caste system based on race

which is totally independent of rational proofs or disproofs of any individual's capacities or abilities. The imposition of such caste status is itself discriminatory. Southern courts candidly recognize this when they award damages for "humiliation" to a white person who has been compelled to ride in the Negro section of a train,[16] or when they award damages to a white person who has been called "Colored."[17]

(3) Another major erroneous assumption in *Plessy* was that the distinction between white and colored people, on trains, rested on valid factual differences and was "a reasonable regulation" with respect to which the State "is at liberty to act with reference to the established usages, customs and traditions of the people, and with a view to the promotion of their comfort, and the preservation of the public peace and good order" (p. 550). The unsoundness of that assumption has been conclusively demonstrated by the anthropological, educational, sociological and international developments from 1896 to 1949. Furthermore, it is obvious that the very purpose of the Fourteenth Amendment was to prevent the use of State authority to impose racial distinctions based on "established usages, customs and traditions." Moreover, this Court has clearly established, in the housing segregation cases, that State-imposed racial segregation cannot be "justified as proper exertions of state police power" for the "preservation of the public peace." *Shelley* v. *Kraemer*, 334 U. S. 1, 21 (1948); *Buchanan* v. *Warley*, 245 U. S. 60, 81 (1917). In addition, this Court has in recent years eloquently expressed

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[16] *Louisville & N. R. Co.* v. *Ritchel*, 138 Ky. 701, 147 S. W. 411 (1912); *Missouri, K. & T. Ry. Co. of Texas* v. *Ball*, 25 Tex. Civ. App. 500, 61 S. W. 327 (1901); *Chicago R. I. & P. Ry. Co.* v. *Allison*, 120 Ark. 54, 178 S. W. 401 (1915).

[17] *Flood* v. *News & Courier Co.*, 71 S. Car. 112, 50 S. E. 637 (1905); *Wolfe* v. *Georgia Ry. & Electric Co.*, 2 Ga. App. 499, 58 S. E. 899 (1907); *Collins* v. *Okla. State Hospital*, 76 Okla. 229, 184 Pac. 946, 947 (1919).

the Constitutional infirmity of racial distinctions by government authority and has firmly established the principle that "Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality." *Hirabayashi* v. *United States*, 320 U. S. 81, 100 (1943); see *Shelley* v. *Kraemer*, 334 U. S. 1, 23 (1948); *Railway Mail Ass'n* v. *Corsi*, 326 U. S. 88, 94 (1945); *Steele* v. *Louisville & Nashville R. Co.*, 323 U. S. 192, 203, 208 (1944); *Korematsu* v. *United States*, 323 U. S. 214, 216 (1944); *Smith* v. *Texas*, 311 U. S. 128, 130 (1940); *Yick Wo* v. *Hopkins*, 118 U. S. 356, 374 (1886).

(4) *Plessy* sought to justify its assumptions by pointing to the existence of "separate schools for white and colored children, which has been held to be a valid exercise of the legislative power . . ." (p. 544). However, most of the court's reliance was on cases such as *Roberts* v. *Cushman*, 59 Mass. (5 Cush.) 198 (1849), decided *before* the Civil War and *before* the adoption of the Fourteenth Amendment. Moreover, this Court has never directly passed upon the constitutional validity of statutes requiring separate schools for white and colored children and this issue is now before this Court in *Sweatt* v. *Painter*, No. 44, October Term, 1949.

(5) Another justification suggested by *Plessy* was that "Laws forbidding the intermarriage of the two races . . . have been universally recognized as within the police power of the State" (p. 545). In fact, however, this Court has never passed upon this question. *Plessy* implicitly recognized this by failing to cite *Pace* v. *Alabama*, 106 U. S. 583 (1883), the only decision of this Court which superficially might have justified the quoted statement, but actually does not do so. *Pace* v. *Alabama* involved an indictment for the crime "of adultery or fornication" (p. 584) between persons of different races under a statute

which imposed a greater punishment for such adultery than was imposed for adultery between persons of the same race. The argument that the statute violated the Fourteenth Amendment was rejected on the ground that the statute "applies the same punishment to both offenders, the white and the black" (p. 585). However, the rationale of the *Pace* case has been undermined by this Court's decision that "Equal protection of the laws is not achieved through indiscriminate imposition of inequalities". *Shelley* v. *Kraemer*, 334 U. S. 1, 22 (1948). In any event *Pace* v. *Alabama* involved a crime, not a question of intermarriage or of governmental interference on the basis of race with the fundamental human right to marry. See also *Perez* v. *Lippold*, 32 Calif. (2d) 711, 198 P. (2d) 17 (1948) (invalidating California anti-miscegenation law).

(6) At p. 545, the *Plessy* majority said: "The distinction between laws interfering with the political equality of the negro and those requiring the separation of the two races in schools, theatres and railway carriages has been frequently drawn by this court." However, neither in the three cases cited by *Plessy* for this proposition, nor in any other case except *Plessy* itself, has this Court ever expressed any such distinction. *Hall* v. *DeCuir*, *supra*, invalidated a state statute prohibiting racial segregation as applied to an interstate vessel only because it was deemed an undue burden on interstate commerce. The *Civil Rights Cases*, *supra*, invalidated the Federal Civil Rights Act of March 1, 1875, which governed private conduct, solely because the Fourteenth Amendment was deemed to preclude only discriminatory State action. And *Louisville, New Orleans, etc., Ry.* v. *Mississippi*, *supra*, merely held that a state segregation statute applicable only to intra-state transportation could not be invalidated solely on the theory that it unduly burdened interstate commerce. This Court

certainly gave no comfort to this distinction when it ruled against racial discrimination and segregation in transportation in the four cases mentioned above in Part III-A of this Brief or when it upheld the New York statute prohibiting exclusion from a labor union on account of race in *Railway Mail Ass'n* v. *Corsi*, 326 U. S. 88 (1945).

(7) Typical of the erroneous and superficial nature of *Plessy* was its statement (p. 548) that "statutes for the separation of the two races upon public conveyances were held to be constitutional in" 12 named state and federal cases. Not one of these cases supports that statement. See analysis of the cases in Edward F. Waite, *The Negro in the Supreme Court*, 30 Minn. L. Rev. 219, 248-251 (March, 1946).

(8) At p. 551, the majority in *Plessy* stated: "The [plaintiff's] argument also assumes that social prejudices may be overcome by legislation, and that equal rights cannot be secured to the negro except by an enforced commingling of the two races. We cannot accept this proposition. If the two races are to meet upon terms of social equality, it must be the result of natural affinities, a mutual appreciation of each other's merits and a voluntary consent of individuals." But this statement errs in positing that compulsory racial segregation is the only alternative to "enforced commingling of the two races." There is a third alternative—voluntary contact between individuals who are not subjected to any statute either restricting or compelling contacts between members of different races. The invalidation of the compulsory segregation statute in *Plessy* would have left only voluntary contact, not "enforced commingling," since there was no law which "enforced commingling." And any person who did not want to use a facility open to the public, such as the trains in *Plessy*, because people of another race were using it would not have

been compelled by law to use it. He would then have been completely free to use it or not to use it. But if he did use it he would not have the right to exclude others, solely because of their race, from using it. See *Ferguson* v. *Gies*, 82 Mich. 358, 367-368, 46 N. W. 718, 721 (1890). At most, the *Plessy* statement noted above justifies only the *elimination* of compulsory racial laws, whether requiring or prohibiting segregation, in order that the white and colored people may arrange their contacts on a voluntary basis. It cannot justify legislation, such as the compulsory segregation law in *Plessy*, or the compulsory regulation in this case, which *creates* social prejudices, *prevents* voluntary contact between individuals of different races, and requires everyone to conform to the bias of a few.

(9) Equally spurious was the statement of the majority in *Plessy* (at p. 551) that "Legislation is powerless to eradicate racial instincts or to abolish distinctions based on physical differences. . . ." That statement simply is not true. Legislation substantially molds social mores. But even if the *Plessy* statement is partially true, it was wholly inapplicable since the legislation in the *Plessy* case *prescribed* legislative distinctions based on race, instead of *forbidding* them as did the statutes in *Bob-Lo Excursion Co.* v. *Michigan*, 333 U. S. 28 (1948) and *Railway Mail Ass'n* v. *Corsi*, 326 U. S. 88 (1945).

D. Compulsory segregation, on the basis of race, is discrimination.

Compulsory racial segregation means discrimination. This fact is commonly known. Every survey of racial segregation has proved it. Those who say that enforced separation can theoretically be accompanied by equality, shut their eyes to the facts of life and ignore the real and fundamental inequality resulting from a caste distinction which is enforced by law.

The President's Committee on Civil Rights stated in its report, *To Secure These Rights*, pp. 81-82 (Oct. 29, 1947):

> "Segregation has become the cornerstone of the elaborate structure of discrimination against some American citizens. Theoretically this system simply duplicates educational, recreational and other public services, according facilities to the two races which are 'separate but equal.' In the Committee's opinion this is one of the outstanding myths of American history for it is almost always true that while indeed separate, these facilities are far from equal. Throughout the segregated public institutions, Negroes have been denied an equal share of tax supported services and facilities. . . . No argument or rationalization can alter this basic fact: a law which forbids a group of American citizens to associate with other citizens in the ordinary course of daily living creates inequality by imposing a caste status on the minority group."

Gunnar Myrdal, in his brilliant and comprehensive study of the American Negro, *An American Dilemma, The Negro Problem and Modern Democracy*, Vol. I, p. 581 (1944) stated:

> "It is evident, however, and rarely denied, that there is practically no single instance of segregation in the South which has not been utilized for a significant discrimination. The great difference in quality of service for the two groups in the segregated set-ups for transportation and education is merely the most obvious example of how segregation is an excuse for discrimination. Again the Southern white man is in the moral dilemma of having to frame his laws in terms of equality and to defend them before the Supreme Court—and before his own better conscience, which is tied to the American Creed—while knowing all the time that in reality his laws do not give equality to Negroes, and that he does not want them to do so."

See also the Report of the President's Commission on Higher Education, Vol. II, p. 31 (Dec. 11, 1947), and the

Report of the National Committee on Segregation in the Nation's Capital, *Segregation in Washington* (Dec. 10, 1948).

These surveys have amply confirmed what state courts have repeatedly held in cases arising under state statutes requiring "equal accommodations," *i. e.*, that a racially segregated accommodation is not an "equal accommodation"—it is "discrimination." *Ferguson* v. *Gies*, 82 Mich. 358, 46 N. W. 718 (1890) (separate table in dining room); *Crosswaith* v. *Bergin*, 95 Colo. 241, 35 P. (2d) 848 (1934) (segregation in restaurant).[18]

The time has come to overrule *Plessy* v. *Ferguson* and to call a halt to the cancerous evil of racial discrimination which has spawned and flourished under the "thin disguise" of the "separate but equal" doctrine.

Respectfully submitted,

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[18] Similar decisions as to theatres are: *Randall* v. *Cowlitz Amusements, Inc.*, 194 Wash. 82, 76 P. (2d) 1017 (1938); *Anderson* v. *Pantages Theater Co.*, 114 Wash. 24, 194 Pac. 813 (1921); *Jones* v. *Kehrlein*, 49 Calif. App. 646, 194 Pac. 55 (1920); *Joyner* v. *Moore-Wiggins Co., Ltd.*, 152 App. Div. 266, 136 N. Y. Supp. 578 (1912); *Baylies* v. *Curry*, 128 Ill. 287, 21 N. E. 595 (1889); *Pickett* v. *Kuchan*, 323 Ill. 138, 153 N. E. 667 (1926). Similar decisions as to schools are: *People* v. *Board of Education of Detroit*, 18 Mich. 400 (1869); *Tape* v. *Hurley*, 66 Calif. 473, 6 Pac. 129 (1885); *Clark* v. *The Board of Directors*, 24 Iowa 266 (1868); *Wysinger* v. *Crookshank*, 82 Calif. 588, 23 Pac. 54 (1890).